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No. 73-1326

In the

Supreme Court of the United States

OCTOBER TERM, 1973

ELGIN, JOLIET & EASTERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

BERNARD FERAK, Special Administrator of the Estate of MICHAEL FERAK, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court.

BRIEF FOR RESPONDENT IN OPPOSITION

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, Bernard Ferak, Special Administrator of the Estate of Michael Ferak, Deceased, respectfully prays that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the Supreme Court of Illinois entered on November 30, 1973.

STATEMENT OF THE CASE

Respondent adopts the statements appearing in the opinion of the Appellate Court of Illinois and the Illinois Supreme Court, the opinions of which courts begin on pages A4 and A1, respectively, of the Appendix to the Petition filed herein.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT

Respondent respectfully submits that there is no good reason for this Court to issue the Writ of Certiorari herein sought. There is no vital question presented in this case to which this Court should devote itself. There is no novel question relative to the supervision of lower courts. There is no conflict of decisions among the courts which have considered any of the issues properly involved herein. There are no decisions properly read which support petitioner. Respondent respectfully submits that petitioner seeks only a third appellate review in circumstances in which its arguments have been rejected in clear and comprehensive opinions by both the Illinois Appellate and Supreme Courts.

Certiorari should not be granted merely to provide an an additional round of appellate review of a question as insubstantial as that presented here.

No court has amended the clear language of Sections 1 and 9 of the F.E.L.A. so as to add a requirement, as petitioner urges be done, that "children" for whose benefit a survival action is maintained be *dependent* "children". The decisions of the Illinois Supreme Court in this case and in *Jensen* v. *Elgin, Joliet & Eastern Railway Co.*, 24 Ill.2d 383, 182 N.E.2d 211 (1962), are in accord with the

related decisions of this Court. See *St. Louis Iron Mountain & Southern Railway Co.* v. *Craft*, 237 U.S. 648, 59 L.Ed. 1160 (1915); *Gulf, Colorado & Santa Fe Railroad* v. *McGinnis*, 228 U.S. 173, 57 L.Ed. 785 (1913); *Michigan Central Railroad Co.* v. *Vreeland*, 227 U.S. 59, 57 L.Ed. 417 (1913). The few times that this issue has arisen in other courts, the application of the statute has been in accord with the decisions of the Illinois Supreme Court in this case and *Jensen*. See, e.g., *Isgett* v. *Seaboard Coastline Railroad Co.*, 332 F. Supp. 1127, 1142 (D.S.C. 1971); *Hopps' Estate* v. *Chestnut*, 324 Mich. 256, 36 N.W. 2d 908, 911-12 (1949); *Petition of United States*, 92 F. Supp. 495, 497 (S.D.N.Y. 1950).

The Courts of Illinois have uniformly construed the unmodified word "children" as used in Section 1 and Section 9 of the Federal Employers' Liability Act (45 U.S.C. §51, et seq.; hereinafter the "FELA") to mean all children regardless of whether they might be "minor" or "adult." Petitioner claims that the word "children" should not mean nondependent adult children.

Petitioner, by its argument, confuses those persons entitled to recovery under FELA with the measure of damages which might accrue to them.

Petitioner starts from an erroneous premise. Petitioner contends that the word "children" in Section 1, the wrongful death provision of the FELA, does not include adult, non-dependent children of the employee and that, therefore, the word "children" in the identical phrase in Section 9, the survival provision, should also be so construed. However, "the word 'children' has its ordinary dictionary meaning in both Sections 1 and 9." *Jensen* v. *Elgin, Joliet & Eastern Railway Company*, 24 Ill.2d 383,

182 N.E.2d 211, 213 (1962). The word "children" or the words "children of such employee" in Section 1 have not been construed as limited to minor dependent children. The restriction in actions under Section 1 upon which petitioner focuses is inherent in wrongful death actions. In such actions it is not a restriction upon "children" as designated beneficiaries of the action, but upon the damages recoverable for the benefit of the employee's children. Damages in such wrongful death actions are measured by and limited to the children's pecuniary loss. *Gulf, Colorado & Santa Fe Railroad* v. *McGinnis,* 228 U.S. 173, 57 L.Ed. 785, 786-87 (1913); *St. Louis, Iron Mountain & Southern Railway Company* v. *Craft,* 237 U.S. 648, 59 L.Ed. 1160, 1163 (1915); *Michigan Central Railroad Company* v. *Vreeland,* 227 U.S. 59, 57 L.Ed. 417, 422 (1913).

The holding of the Supreme and Appellate Courts of Illinois in the instant case and in the earlier case of *Jensen* v. *Elgin, Joliet & Eastern Railway Company,* 24 Ill.2d 383, that "the word 'children' has its ordinary dictionary meaning in both sections 1 and 9" is manifestly correct.

Nothing to the contrary appears in the opinion of the Missouri Supreme Court in *Auld* v. *Terminal Railroad Association,* 463 S.W.2d 297 (1970), which is misconstrued and erroneously relied upon by petitioner (Pet. 9) *Auld* was an action brought by the personal representative of a deceased railroad worker under Section 9 of the FELA for the benefit of the decedent's brother and two sisters. These beneficiaries, if within the statute, fell within the third class of beneficiaries under Section 9 as "the next of kin dependent upon such employee" (45 U.S.C., §59). The decedent's brother and sisters were not financially dependent upon him and he did not contribute to the

support of any of them. The trial court entered judgment for the defendant and the Supreme Court affirmed.

Plaintiff in *Auld* contended on appeal that since damages in a survival action under Section 9 are in no way measured by the pecuniary loss of the beneficiaries, a showing that the beneficiaries depended upon the decedent for companionship and entertainment should be sufficient to show that the beneficiaries were "dependent" next of kin within the meaning of Section 9. The Court held that the difference in the measure of damages in Sections 1 and 9 had no "effect on the intention of Congress in its use of the word 'dependent' as a condition for recovery by a next of kin," that "the word 'dependent' in each section has the same meaning" and that "when Congress provided for recovery by a dependent next of kin it intended that there be actual dependency, i.e., a need for support on the part of the beneficiary, and actual financial contributions or the furnishing of other valuable elements of support by the deceased." 463 S.W.2d at 299-300.

Congress explicitly used the word "dependent" to modify the words "next of kin" in both Sections 1 and 9 of the FELA. However, Congress did not use the word "dependent" to modify "children" or any of the other relatives falling within the first two classes of beneficiaries of those sections. There is no discussion in *Auld* of the meaning of "children" in either Section 1 or Section 9. Thus, there is absolutely no basis for petitioner's contention in the instant case that to the Missouri court the word "children" as used in Section 9 has the same meaning of 'minor dependent children' in Section 1.

There is nothing in the legislative history of Section 9 of the FELA which supports petitioner. See S. Rep. No. 432, 61st Cong., 2d Sess. 3 (1910).

As stated by the Supreme Court of Illinois in its opinion below: (Petition, A3)

> ". . . Clearly, it has been the inability of nondependent children to demonstrate loss under this section that has precluded their recovery and not any statutory or judicial restriction placed upon children in the class for whom relief is created. (24 Ill.2d 383, 385-86.) We adhere to *Jensen's* interpretation of sections 1 and 9, and our conclusion is in no way altered by the result reached by the Missouri Supreme Court in the case of *Auld* v. *Terminal R.R. Association* (Mo. 1970), 463 S.W.2d 297, cert. denied, 401 U.S. 940, 28 L.Ed.2d 220, 91 S. Ct. 938, cited by defendants. *Auld* dealt with two nondependent sisters and a brother of the deceased who sought damages for his wrongful death. Obviously their recovery was properly denied since they were not "next of kin dependent upon such employee" as explicitly required by the statute."

The Illinois Supreme Court has succinctly summarized the law under the statute. There is no conflict between its holding and the rulings of either this Court or that of the Supreme Court of Missouri in *Auld* v. *Terminal R. Association,* 463 S.W.2d 297 (1970). In the circumstances, there is neither an important nor confusing question involved in this case.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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